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Ali bin Tan Sri Abdul Kadir & Ors v Simpang Empat Plantation Sdn Bhd

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02–25 OF 2006(A), 02–30 OF 2006(A), 02–31 OF 2006(A)
ABDUL HAMID MOHAMAD, CHIEF JUSTICE, AUGUSTINE PAUL AND ABDUL AZIZ MOHAMAD FCJJ
2 JULY 2008

C

Companies and Corporations — Receivership — Power to sell property — Whether directors could commence action on behalf of company under receivership — Whether receivers and managers had powers to sell land pursuant to debenture — Whether decision can be applied to National Land Code

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In 1990, the respondent obtained a loan from MBf Finance Bhd (the fourth appellant) for RM2.5m. The loan was secured by a debenture and a charge under the National Land Code (NLC). In May 1992, the fourth appellant recalled the loan and appointed the first three appellants as receivers and managers (the receivers and managers) of the respondent company pursuant to the debenture. The respondent company attempted to prevent the fourth appellant and the receivers and managers from selling the land, which was subject to the charge, by commencing a writ action against them. Subsequently the respondent filed an application to restrain the receivers and managers from entering into any sale, disposal or other forms of conveyance in respect of the land. At the hearing of the application the receivers and managers raised a preliminary objection that as the respondent company was under receivership the directors of the respondent company had no right to institute an action on behalf of the company. The High Court agreed with this contention and ruled that the directors had no power to institute the action because the receivers and managers had already been appointed. However, in his written judgment the High Court judge held that, although the receivers and managers were the proper persons to commence the action they had no power to sell the property. On appeal to the then Supreme Court, the court upheld the High Court judge's ruling on the preliminary objection and dismissed the appeal. In its grounds of decision this court had made it clear that the appointment of receivers and managers pursuant to a debenture did not, in itself, prevent the directors of the company creating the debenture from pursuing a right of action. The decision then went on to say that the directors could commence an action on behalf of the company if it would be in the interest of the company and would not impinge prejudicially upon the position of the debenture holders by threatening or imperiling the

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assets which were the subject of the charge, which would depend on the facts of each case. After having considered the facts of the case the Federal Court concluded that as it had not been shown that the action of the directors would benefit the company, and since the defendants had not given indemnity for costs, the respondent's application was dismissed. That decision brought the respondent's case (the first action) to an end.

Thereafter, the respondent filed an originating summons in the High Court against the same four appellants in the first action and added two new defendants (the second action). They were the purchaser of the land (the fifth appellant) and the registered proprietor of the land from 29 September 1994 (the sixth appellant). In this second action the respondent prayed, inter alia, for the transfer of the land to the sixth appellant to be declared null and void and of no effect due to non-compliance with ss 340(2) and/or 340 (b) of the NLC. The appellants raised the same preliminary objection that they had raised in the first action. The High Court judge ruled that the preliminary objection be heard first and separately of the merits because, if the appellants succeeded on the preliminary objection there would be no necessity to hear the merits of the application. After hearing the submissions of parties, the High Court judge concluded that this second action although differently worded was in essence seeking for the same relief as the declaration sought for in the first action ie that the receivers and managers did not enjoy any power of sale on the land. He therefore went on to hold that since this matter had been put to rest by the Federal Court in the first action, ie, that the directors under the circumstances found in the first action did possess the power to institute the action, since it could not be shown that it would benefit the company and that those circumstances had not changed. However, the respondent argued that there was a material difference in circumstances in the second action because an offer for costs to meet the indemnity qualification was made. This offer was however, perceived by the judge to be a non-offer as the respondent company's assets remained endangered by the application. In the end, the High Court being bound by the Federal Court's decision upheld the preliminary objection and struck out the second action with costs. The second action went on appeal and the Court of Appeal allowed the appeal and set aside the order of the High Court. Hence this appeal by the appellants to the Federal Court, based on three questions: whether the doctrine of res judicata as stated in *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 is applicable to Malaysian law; whether the Court of Appeal ought to have applied the Federal Court decision in *Melatrans Sdn Bhd v Carah Development Sdn Bhd* [2003] 2 MLJ 193; and whether s 192(2) of the Companies Act 1965 could be relied upon to set aside the sale of the land by the receivers and managers.

Held, dismissing the appeal with only half costs to be paid by the appellants to the respondent:

(1) The decision of this court in the first action was based on the facts and

circumstances of the case before the court then and relevant for the determination of the issues raised in the preliminary objection. This decision was not a final judgment after a full trial of the suit that would close any attempt to relitigate. All that the court said was that the directors had not shown that they had satisfied the requirements laid down by the court. The action was dismissed on the issue of locus standi alone, not because there was an absolute prohibition on the directors from bringing an action, but because they had not satisfied the conditions to justify them to do so. That being the case, there was nothing to prevent the directors from bringing another action, such as this second action provided they could satisfy the conditions. Therefore the first action did not prevent the second action from being filed, because the first action was decided purely on the issue of locus standi of the directors and not the merits, based on the circumstances then (see paras 22–23).

(2) It would appear that the High Court judge had considered whether there were new circumstances that would justify the directors' decision to relitigate and having found none, allowed the preliminary objection and struck off the action. The Court of Appeal, on the other hand made no mention of the High Court judge's findings that the circumstances had not changed at all but instead relied on *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd and Ors* [1997] 2 MLJ 805 (*Kimlin*'s case) and held that because of that decision by this court, all the requirements had been satisfied. In doing so it purported to rely on the doctrine of res judicata in the wider sense (see paras 27–28).

(3) *Kimlin*'s case does not retrospectively affect the decision of this court in the first action. The issue in *Kimlin*'s case was whether a chargee could sell the charged land without resorting to the NLC and this was not an issue in the preliminary objection in the first action. Even if the issues in both cases were the same and the court had decided differently in the respondent's first action, a subsequent decision in a later case, ie *Kimlin*'s case, by this court would not have the effect of reopening the judgment in the respondent's first action because that action had already been decided and the decision was final (see para 31).

(4) *Kimlin*'s case decided that a chargee of land could not by a contract, which includes a debenture, exclude the operation of ss 254 to 265 of the NLC. Therefore if the receivers and managers have no power to sell without resorting to the provisions of the NLC, according to *Kimlin*'s case the transfer would be void. The decision therefore did have an impact on the second action for the purpose of deciding the preliminary objection, in that, now that the sale may be void, the requirement of the law had been satisfied for the directors to bring the second action. The

second action was a new action and it did not reopen the first action. Therefore there was no question of *Kimlin*'s case being applied retrospectively when applied to the second action. In the circumstances there was no necessity for the Court of Appeal to rely on the doctrine of res judicata in the wider sense (see paras 29–30 & 35–36).

(5) The second question in this appeal might be an issue in this case in the High Court and should not be answered as yet while the third question is irrelevant (see paras 37–38).

[Bahasa Malaysia summary

Pada tahun 1990, responden memperoleh pinjaman daripada MBf Finance Bhd (perayu keempat) sebanyak RM2.5j. Pinjaman tersebut dijamin oleh satu debentur dan gadaian di bawah Kanun Tanah Negara (KTN). Pada bulan Mei 1992, perayu keempat menarik balik pinjaman tersebut dan melantik tiga perayu-perayu pertama sebagai penerima dan pengurus syarikat responden (penerima dan pengurus) menurut debentur tersebut. Syarikat responden mencuba untuk menghalang perayu keempat dan penerima dan pengurus daripada menjual tanah, yang tertakluk kepada gadaian tersebut, dengan memulakan tindakan writ terhadap mereka. Kemudian, responden memfailkan permohonan untuk menghalang penerima dan pengurus daripada memasuki sebarang penjualan, pelupusan atau apa bentuk pemindahan berkaitan dengan tanah tersebut. Semasa perbicaraan permohonan tersebut penerima dan pengurus membangkitkan bantahan awal bahawa, oleh kerana syarikat responden adalah di bawah kuasa penerima, pengarah-pengarah syarikat responden tidak mempunyai hak untuk memulakan tindakan bagi pihak syarikat. Mahkamah Tinggi bersetuju dengan hujahan ini dan memutuskan bahawa pengarah-pengarah tersebut tidak mempunyai kuasa untuk memulakan tindakan kerana penerima dan pengurus telah pun dilantik. Walau bagaimanapun, di dalam penghakiman bertulisnya, hakim Mahkamah Tinggi memutuskan bahawa walaupun penerima dan pengurus adalah pihak yang sepatutnya memulakan tindakan, mereka tidak mempunyai kuasa untuk menjual harta tersebut. Atas rayuan ke Mahkamah Agung pada ketika itu, mahkamah tersebut mengesahkan keputusan hakim Mahkamah Tinggi atas bantahan awal dan menolak rayuan. Dalam alasan keputusannya, mahkamah ini telah memperjelaskan bahawa pelantikan penerima dan pengurus menurut debentur semata-mata tidak menghalang pengarah-pengarah syarikat yang mewujudkan debentur tersebut daripada melaksanakan hak untuk bertindak. Keputusan itu selanjutnya menyatakan bahawa pengarah-pengarah tersebut boleh memulakan tindakan bagi pihak syarikat jika ia adalah bagi kepentingan syarikat dan tidak akan memberi kesan yang memprejudis kepada kedudukan pemegang-pemegang debentur dengan mengancam atau membahayakan aset-aset yang merupakan perkara gadaian, yang akan bergantung kepada

A fakta setiap kes. Selepas mempertimbangkan fakta-fakta kes tersebut, Mahkamah Persekutuan memutuskan bahawa, oleh kerana ia tidak ditunjukkan bahawa tindakan pengarah-pengarah akan menguntungkan syarikat, dan oleh kerana defendan-defendan tidak memberikan ganti rugi untuk kos, permohonan responden adalah ditolak. Keputusan tersebut
B mengakhiri tindakan responden (tindakan pertama).

Kemudian, responden memfailkan saman pemula di Mahkamah Tinggi terhadap keempat-empat perayu yang sama di dalam tindakan pertama dan menambah dua defendan baru (tindakan kedua). Mereka adalah pembeli tanah (perayu kelima) dan pemilik berdaftar tanah dari 29 September 1994
C (perayu keenam). Di dalam tindakan kedua ini, responden memohon, antara lain, untuk pindah milik tanah kepada perayu keenam diisytiharkan batal dan tidak sah dan tidak mempunyai kesan disebabkan oleh ketidakpatuhan dengan ss 340(2) dan atau 340(b) KTN. Perayu-perayu membangkitkan
D bantahan awal yang sama yang mereka telah bangkitkan di dalam tindakan pertama. Hakim Mahkamah Tinggi memutuskan bahawa bantahan awal didengar dahulu dan berasingan daripada merit-merit kerana, jika perayu-perayu berjaya di dalam bantahan awal, tidak ada keperluan untuk mendengar merit-merit permohonan. Selepas mendengar hujahan
E pihak-pihak, hakim Mahkamah Tinggi memutuskan bahawa tindakan kedua ini walaupun dikemukakan secara berbeza, adalah pada dasarnya memohon relief yang sama seperti deklarasi yang dipohon di dalam tindakan pertama iaitu penerima dan pengurus tidak mempunyai sebarang kuasa untuk menjual tanah tersebut. Beliau, oleh itu memutuskan bahawa, oleh kerana
F perkara ini telah diputuskan oleh Mahkamah Persekutuan di dalam tindakan pertama iaitu pengarah-pengarah di dalam keadaan yang didapati di dalam tindakan pertama tidak mempunyai kuasa untuk memulakan tindakan, oleh kerana ia tidak boleh ditunjukkan bahawa ia akan menguntungkan syarikat dan bahawa keadaan tersebut tidak berubah. Walau bagaimanapun,
G responden menghujah bahawa terdapat perbezaan yang ketara di dalam keadaan di dalam tindakan kedua kerana tawaran untuk kos yang memenuhi batasan ganti rugi telah dibuat. Tawaran ini, walau bagaimanapun, dilihat oleh hakim sebagai tawaran yang tidak sah kerana aset-aset syarikat responden masih dalam keadaan bahaya oleh permohonan tersebut. Pada
H akhirnya, Mahkamah Tinggi yang terikat dengan keputusan Mahkamah Persekutuan mengesahkan bantahan awal tersebut dan membatalkan tindakan kedua dengan kos. Tindakan kedua diteruskan dengan rayuan dan Mahkamah Rayuan membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi. Maka rayuan ini oleh perayu-perayu ke Mahkamah
I Persekutuan, berdasarkan tiga persoalan: sama ada doktrin res judicata seperti yang dinyatakan di dalam *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 beraplikasi dalam undang-undang Malaysia; sama ada Mahkamah Rayuan sepatutnya mengaplikasi keputusan Mahkamah Persekutuan di dalam *Melatrans Sdn Bhd v Carah Development Sdn Bhd* [2003] 2 MLJ

193; dan sama ada s 192(2) Akta Syarikat 1965 boleh disandarkan untuk mengenepikan penjualan tanah oleh penerima dan pengurus. A

Diputuskan, menolak rayuan dengan separuh kos dibayar oleh perayu-perayu kepada responden: B

(1) Keputusan mahkamah ini di dalam tindakan pertama adalah berdasarkan kepada fakta dan hal keadaan kes di hadapan mahkamah pada masa itu dan relevan untuk pertimbangan isu-isu yang dibangkitkan di dalam bantahan awal. Keputusan ini bukan keputusan muktamad selepas perbicaraan penuh guaman tersebut yang akan menutup apa-apa cubaan untuk perbicaraan semula. Apa yang dikatakan mahkamah adalah, pengarah-pengarah tidak menunjukkan bahawa mereka telah memenuhi keperluan yang digariskan oleh mahkamah. Tindakan tersebut ditolak atas isu locus standi semata-mata, bukan kerana mereka tidak memenuhi syarat-syarat untuk menjustifikasi mereka berbuat demikian. Berdasarkan alasan tersebut, tidak ada apa-apa yang menghalang pengarah-pengarah daripada membawa sebuah lagi tindakan, seperti tindakan kedua ini, jika mereka boleh memenuhi syarat-syarat tersebut. Oleh itu tindakan pertama tidak menghalang tindakan kedua daripada difailkan, kerana tindakan pertama diputuskan semata-mata atas isu locus standi pengarah-pengarah dan bukan merit, berdasarkan hal keadaan pada ketika itu (lihat perenggan 22–23). C D E F

(2) Ia jelas bahawa hakim Mahkamah Tinggi telah mempertimbangkan sama ada terdapat hal keadaan baru yang akan menjustifikasi keputusan pengarah-pengarah untuk membicara semula dan setelah mendapati tiada satu pun, membenarkan bantahan awal dan membatalkan tindakan tersebut. Mahkamah Rayuan, sebaliknya, tidak menyatakan apa-apa mengenai penemuan hakim Mahkamah Tinggi bahawa hal keadaan tidak berubah langsung tetapi sebaliknya bersandar atas *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd and Ors* [1997] 2 MLJ 805 (kes *Kimlin*) dan memutuskan bahawa disebabkan oleh keputusan tersebut oleh mahkamah ini, kesemua keperluan telah dipenuhi. Dalam berbuat demikian, ia cuba menyandar ke atas doktrin res judicata dalam erti kata yang luas (lihat perenggan 27–28). G H

(3) Kes *Kimlin* tidak memberi kesan secara kebelakangan terhadap keputusan mahkamah ini di dalam tindakan pertama. Isu di dalam kes *Kimlin* adalah sama ada pemberi gadaian boleh menjual tanah tanpa bergantung kepada KTN dan ini bukanlah isu di dalam bantahan awalan di dalam tindakan pertama. Walaupun isu-isu di dalam kedua-dua tindakan adalah sama dan mahkamah telah memutuskan secara berbeza di dalam tindakan pertama responden, keputusan I

kemudian di dalam kes yang kemudian, iaitu kes *Kimlin*, oleh mahkamah ini tidak akan mempunyai kesan membuka semula penghakiman di dalam tindakan pertama responden kerana tindakan itu telah diputuskan dan keputusannya adalah muktamad (lihat perenggan 31).

(4) Kes *Kimlin* memutuskan bahawa pemegang gadaian tanah tidak boleh melalui kontrak, yang termasuk debentur, mengecualikan pemakaian ss 254 hingga 265 KTN. Oleh itu jika penerima dan pengurus mempunyai kuasa untuk menjual tanpa bergantung kepada peruntukan-peruntukan KTN, menurut kes *Kimlin*, pindah milik tersebut akan batal. Keputusan tersebut oleh itu mempunyai kesan terhadap tindakan kedua untuk tujuan memutuskan bantahan awalan, di mana, sekarang penjualan tersebut boleh menjadi batal, keperluan undang-undang telah dipenuhi oleh pengarah-pengarah untuk memulakan tindakan kedua. Tindakan kedua adalah tindakan baru dan ia tidak membuka semula tindakan pertama. Oleh itu, tidak terdapat persoalan kes *Kimlin* diaplikasi secara kebelakangan apabila digunakan di dalam tindakan kedua. Dalam hal keadaan ini, tidak perlu untuk Mahkamah Rayuan menyandar atas doktrin res judicata dalam erti kata yang luas (lihat perenggan 29–30 & 35–36).

(5) Soalan kedua di dalam rayuan ini mungkin adalah isu di dalam kes ini di Mahkamah Tinggi dan tidak boleh dijawab lagi dan persoalan ketiga tidak relevan (lihat perenggan 37–38).]

Notes

For a case on power to sell property, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 658

Cases referred to

AC Willis v IMN Willis & EH Hodgson [1941] MLJ 169 (refd)

B Johnson & Co (Builders) Ltd, Re [1955] 1 Ch 634 (refd)

Cavendish Bentinck v Fenn (1887) 12 App Cas 652 (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346 (refd)

Johnson v Gore Wood & Co (a firm) [2001] 1 All ER 481 (refd)

K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor [2005] 2 MLJ 201 (refd)

Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (not folld)

M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (refd)

Melatrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor [2003] 2 MLJ 193 (refd)

Roberto Building Material Ptd Ltd v Oversea-Chinese Banking Corp & Anor (No 2) [2003] 3 SLR 217 (refd)

Tan Ah Teck (t/a Plumcon Plumbing & Construction Co) v Coffral (M) Sdn Bhd [1992] 1 MLJ 553 (refd)

Legislation referred to

Companies Act 1965 ss 192(2), 305(1)
National Land Code ss 254, 265, 340(2)(b), 340(4)(b)

Leong Kok Keong (Mohamed Khairil Abidin with him)(Kean Chye & Sivalingam) for the first, second and third appellants.

Mohd Ariff Yusof (Abdullah Abd Rahman with him)(Cheang & Ariff) for the fourth appellant.

Gurbachan Singh (Bachan & Kartar) for the fifth and sixth appellant.

L Sabapathy (Wong Guo Bin and S Bhuvaneswary with him) (Logan Sabapathy & Co) for the respondent.

Abdul Hamid Mohamad Chief Justice (delivering judgment of the court):

[1] Simpang Empat Plantation Sdn Bhd ('Simpang Empat') the respondent herein was the registered owner of the land in question. In 1990 it obtained a loan from the fourth appellant ('MBf Finance Bhd') for RM2.5m. The loan was secured by a debenture and a charge under the National Land Code ('NLC'). In May 1992, MBf Finance Bhd recalled the loan and appointed the first three appellants as receivers and managers of Simpang Empat pursuant to the debenture. Simpang Empat then filed a writ against the first four appellants ie, MBf Finance Bhd and the receivers and managers claiming that the receivers had no power of sale over the said plantation. Simpang Empat also asked for an injunction to be granted against the receivers to restrain them from proceeding with the sale of the said plantation. This suit is Kuala Lumpur High Court Civil Suit No D4–22–1289 of 1992. Subsequently, Simpang Empat filed an ex parte application in the same civil suit to restrain the receivers and managers from entering into any sale, disposal or other forms of conveyance whatsoever in respect of the said land. At the hearing of the application inter partes, learned counsel for the receivers and managers raised a preliminary objection that the directors of Simpang Empat had no right to bring the action in the name of the company because it was under receivership. He argued that the proper persons who had the power to bring the action were the receivers and managers. The learned High Court judge, Dato' Dr Zakaria M Yatim (as he then was) agreed with the submission and ruled that the directors had no power to institute the action because the receivers and managers were already appointed.

[2] However, in his written judgment given subsequently, the learned judge was of the view that he was wrong in holding that the receivers had the power to sell the property.

[3] However, on appeal to the then Supreme Court in Supreme Court Civil Appeal No 02–45 of 1994, the court which by then had been renamed 'Federal Court' upheld the High Court judge's ruling on the said preliminary objection and dismissed the appeal. The Federal Court gave the following reasons, which is quoted in full:

> After considering submissions by both counsel and the facts and circumstances of the case, we are of the unanimous view that the appeal be dismissed with costs to the respondents to be taxed if not agreed. Deposit to account of costs.
>
> The appointment of receivers pursuant to a debenture does not, in itself, prevent the directors of the company creating the debenture from pursuing a right of action. The directors can pursue if in doing so, it would be in the interest of the company and would not impinge prejudicially upon the position of the debenture holders by threatening or imperilling the assets which are subject of the charge. Much depends on the facts and circumstances of each case.
>
> In the present case, it has not, in our view, been shown that the action would benefit the company thereby justifying the action. Also, the directors had not given indemnity for costs. The appeal is dismissed.

[4] That case will be referred to as 'Simpang Empat No 1.

[5] In 1996, Simpang Empat filed an originating summons at the High Court at Ipoh vide Originating Summons No 25–54 of 1996. Besides the four defendants in Simpang Empat No 1, (ie, MBf Finance Bhd and the receivers and managers), Simpang Empat added two new defendants as the fifth and the sixth defendants (the fifth and sixth appellants herein). The fifth appellant was the purchaser of the said land at a price of RM4.8m. The sixth appellant was the registered proprietor of the land from 29 September 1994. This case is referred to as 'Simpang Empat No 2'. In Simpang Empat No 2, Simpang Empat prays for the following orders:

(i) that the transfer of the property known as PN 35553, Lot No 9108, Mukim Hutan Melintang, Daerah Hilir Perak, Perak ('land') to the sixth appellant be declared null and void and of no effect due to non-compliance of the provisions under ss 340(2)(b) and/or 340(4)(b) of the National Land Code;

(ii) that the registrar of title be directed to revoke the endorsement of registration on the documents of title regarding the transfer of the said land to the sixth appellant.

(iii) that the fourth appellant (MBf Finance Bhd) be ordered to refund the redemption sum which was received from the charge vide Presentation Bil 9755/91, Jilid 3912, Folio 18 to the sixth appellant;

(iv) that the sixth appellant be ordered to return the document of title relating to the said land to the fourth appellant in exchange with the redemption money as stated in paragraph (iii) above; and

(v) that the registrar of title be directed to reinstate the endorsement of registration relating to Presentation Bil 9755/91, Jilid 3912, Folio 18 and cancel the discharge of charge.

[6] The same preliminary objection that was raised in Simpang Empat No 1 was again raised in Simpang Empat No 2. The learned High Court judge who heard Simpang Empat No 2 was Abdull Hamid Embong J (as he then was). He clearly stated in his grounds of judgment that he had ruled against Simpang Empat's 'proposition that the preliminary objection could be taken up simultaneously with arguments on the merits of this application'. The learned judge also ruled that if the appellants succeeded on the preliminary objection, the hearing on merits of the application would not be necessary. The learned judge further stated:

> Furthermore, the plaintiff (Simpang Empat — added) had earlier agreed to have the preliminary objection heard first, and separately of the merits. They cannot now retract from that stand.

[7] So, the point that should be made at this stage is that, the merits of the case had not been heard by the learned High Court judge.

[8] The learned judge held:

> It cannot be doubted that this application, in substance, is to challenge the powers of the receivers to deal under receivership with the landed assets of the plaintiff company (although in the prayer of this originating summons, the relief sought is for a declaration that the transfer of the plaintiff's land to the sixth defendant pursuant to the sale by the receivers, is null and void). Put another way, the plaintiff herein (Simpang Empat — added) clearly intends to interfere with the basic functions of the receivers, a function duly exercised pursuant to their power to sell under cl 23 of the debenture. This is clearly in contravention of one of the conditions set under Newhart Developments, and it is my finding that the directors purporting to exercise their residual powers, cannot disrupt the receivers' function. As earlier stated, although differently worded, this application is in essence seeking for the same relief as the declaration sought for in Simpang Empat No 1, ie, that the receivers and managers do not enjoy any power of sale on the plaintiff's (Simpang Empat's — added) land.

A It is my view that the matter had been put to rest by the Federal Court No 1. I cannot, with respect, agree with Mr Sabapathy's suggestion that this court should exercise caution in interpreting the Federal Court's decision since it had not given full grounds for its decision. The reason given by the Federal Court, although not lengthy nor rhetorical, is clear, ie, that the directors, under the circumstances found
B under Simpang Empat No 1, no longer possess the power to institute the action, since it could not be shown that such an action would benefit the company. Those circumstances, in my view, have not changed under this application in spite of Mr Sabapathy's attempt to convince me that there was at least one material difference in that an offer for costs was made in this application to meet the indemnity qualification. However, this offer was made not by the directors
C personally as I feel they should, but by counsel. It was also rejected by the defendants (the appellants herein — added) as being inadequate and qualified and I agree. As such, I find that the offer to be a non-offer and thus, the company's assets remain endangered by this application.

D Having considered submissions and the circumstances surrounding this application I am in agreement with defence counsel's stand that this court is bound by the Federal Court's decision. This preliminary objection is therefore upheld and the originating summons be struck out with costs.

E **[9]** The matter went on appeal to the Court of Appeal vide Civil Appeal No A-02–139 of 1997. The Court of Appeal allowed the appeal, set aside the order of the High Court and remitted the case to the High Court for the court to hear and dispose of the matter.

F **[10]** This court, on 5 July 2006 granted leave to the appellants to appeal to this court on the following questions:

(1) In view of the decision of the House of Lords in *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 (*Johnson v Gore Wood*), to what extent the doctrine of res judicata stated therein is applicable in
G Malaysian law?

(2) Whether the Court of Appeal ought to have applied the Federal Court decision in *Melatrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor* [2003] 2 MLJ 193 in the appeal before it in view of the similar factual
H matrix in *Melatrans* and the appeal before the Court of Appeal?

(3) Could s 192(2) of the Companies Act 1965 be relied upon in the present matter to set aside the sale of the subject land by the receivers and managers?

I **[11]** Now, going back to the judgment of the Court of Appeal. Let me try to summarise the main points of the judgment as far as I can understand it.

[12] It started off by saying that one of the main, if not the only, issue in Simpang Empat No 1 was whether the respondents' directors could bring an action in the name of the company against the appellants. However, in Simpang Empat No 1, this court did not decide on what the Court of Appeal called the 'incidental question' which was whether receivers and managers had power to sell the said property pursuant to the debenture. That issue, ie, the incidental question was decided by this court in *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 about two months after Simpang Empat No 2 was decided by the High Court (Abdull Hamid Embong J) and about three weeks *after* the learned judge gave his written judgment. *Kimlin* decided that a chargee of land could not by a contract — and a debenture is a contract — exclude the operation of ss 254–265 of the National Land Code ('NLC'). The Court of Appeal then said:

> 4. There can be little or no doubt that if *Kimlin* had been decided before the Federal Court handed down its decision in the appeal in respect of the first suit, it would not — indeed it could not — have held that any judgment in favour of the instant appellant in the first suit would not have benefited it. This is because if there was no power in the receivers and managers (the instant first to third respondents) (in the Court of Appeal — added) to sell the land in question, the purported sale would have been set aside thereby reverting the land to the appellant (Simpang Empat — added). So too, had the learned judge heard the application to strike out the amended summons in the present instance after *Kimlin*, he would have refused the application. Again, because, as a matter of precedent, *Kimlin,* as a later decision, had the effect of overreaching the decision in the first suit.

[13] The Court of Appeal then went on to cite at great length passages from the judgment of the Court of Appeal in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346. The court then posed the question:

> So the question that is to be asked here is this: if the second suit is permitted to proceed will it favour an abuse of process? In my judgment it will not. Indeed, I am satisfied that abuse of process would be favoured rather than prevented by refusing the appellant permission to reopen the issue.

[14] Applying *Kimlin* and *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, the court concluded:

> It follows as a matter of essential justice that the issues should be re-opened because persons who are not in law entitled to have property must be made to return it.

[15] The Court of Appeal then dealt with the argument of learned counsel for MBf Finance Bhd that, if the second suit was allowed to proceed, it would interfere with the powers of the receivers and managers. In dismissing the

A argument, the court referred to a passage in *Tan Ah Teck (t/a Plumcon Plumbing & Construction Co) v Coffral (M) Sdn Bhd* [1992] 1 MLJ 553 at pp 558–559, s 192(2) of the Companies Act 1965, *Re B Johnson & Co (Builders) Ltd* [1955] 1 Ch 634, *Roberto Building Material Ptd Ltd v Oversea-Chinese Banking Corp (No 2)* [2003] 3 SLR 217,
B *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor* [2005] 2 MLJ 201, *AC Willis v IMN Willis & EH Hodgson* [1941] MLJ 169, s 305(1) of the Companies Act 1965 and *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652.

C **[16]** Then, returning to the instant appeal, the court held that, 'it cannot by any stretch of imagination be said that penalising the receivers and managers for doing an act, namely selling and transferring the subject land, they were not entitled in law to do is hardly an interference with their function. So, there is really no interference at all. It is only a question of
D making the wrongdoers accountable. All that is quite in order'. The court further held that there was 'no question of imperilling the appellant's (Simpang Empat's — added) assets here. Quite the opposite'. This is because: 'If the appellant's (Simpang Empat's — added) summons proceeds to trial and terminates in the appellant's (Simpang Empat's — added) favour, then
E the subject land returns to the appellant (Simpang Empat — added). There is a benefit to the appellant (Simpang Empat — added) and no peril to the asset.' The court then concluded:

F > Taking a step back once again and viewing the facts of this case in its totality, it is clear that the justice of the case lies in permitting the summons to proceed and to have the issues reopened.

[17] It appears to me that the effect of the reasoning of the Court of Appeal
G is this: where the Federal Court decides in a subsequent case on a point of law (in this case, *Kimlin*) a case decided earlier by the Federal Court (in this case, Simpang Empat No 1) may be reopened on grounds of justice. To justify it, the Court of Appeal purported to rely on the doctrine of res judicata in a wider sense.

H

[18] To my mind, in determining whether res judicata applies or not, two questions must be answered. First, what was the issue decided in Simpang Empat No 1 and what is the issue raised in the preliminary objection in Simpang Empat No 2? Secondly, what is the relevance of *Kimlin*?

I

[19] On the first question, it has been shown that in Simpang Empat No 1 the preliminary objection raised was that the directors had no locus to bring the action in the name of the company because the receivers and managers had been appointed. That too was what the judgment of this court was about.

This court had said very clearly that, first, the appointment of receivers and managers pursuant to a debenture does not, *in itself*, prevent the directors of the company creating the debenture from pursuing a right of action.

[20] Secondly, the directors may do so if it would be in the interest of the company and would not impinge prejudicially upon the position of the debenture holders by threatening or imperilling the assets which are the subject of the charge. That depends on the facts and circumstance of each case.

[21] Thirdly, having laid down the principle, it considered the facts and circumstances of the case before it, then. The court then concluded that it had not been shown that the action of the directors would benefit the company and was therefore justified. Furthermore, the directors had not given the indemnity for costs.

[22] So, the decision of this court then was based on the facts and circumstances of the case before the court then and relevant for the determination of the issue raised in the preliminary objection. It was not a 'final judgment' after a full trial of the suit that would close any attempt to relitigate. All that the court said was that based on the facts and circumstance then before the court the directors had not shown that they had satisfied the requirements laid down by the court. The action was dismissed on the issue of locus standi alone, even then not because there was an absolute prohibition on the directors from bringing an action, but because they, then, did not satisfy the conditions to justify them to do so.

[23] That being so, in my view, there is nothing to prevent the directors from bringing another action. Whether they would succeed or not depends on whether, now, they could satisfy those conditions.

[24] That is what we should be looking at. Has there been shown now (in Simpang Empat No 2) that the directors had satisfied those conditions?

[25] First, let us look at the High Court judgment (Abdull Hamid Embong J's judgment).

[26] It must first be noted from the judgment that, even when the learned judge was repeating the arguments of learned counsel for Simpang Empat, hardly any new facts were mentioned except that an offer for costs was made in the Simpang Empat No 2 to meet the indemnity requirement. Learned counsel, from the judgment, appears to be merely rearguing the same issue. The learned judge concluded that the circumstances had not changed in spite of Mr Sabapathy's attempt to convince him that there was at least one

material difference in that an offer for costs was made in Simpang Empat No 2 to meet the indemnity qualification. However, for the reasons given by him which were reproduced earlier, he held that the offer was a non-offer and thus the company's assets remained endangered.

[27] In other words, the learned judge did consider whether there were new circumstances that would justify the directors' decision to relitigate and found that there was none. So, he allowed the preliminary objection.

[28] Let us now look at the judgment of the Court of Appeal. The Court of Appeal made no mention whatsoever of the finding of the High Court judge that the circumstances had not changed at all. Instead, the Court of Appeal relied on *Kimlin* and in effect, held that because of the decision of this court in *Kimlin*, all the requirements had been satisfied. In so doing, it purported to rely on the so-called doctrine of res judicata in the wider sense.

[29] What did *Kimlin* decide? It decided that a chargee of land could not by a contract — and a debenture is a contract — exclude the operation of ss 254 to 265 of the NLC. Was that the issue in both the preliminary objections? Of course it was not, because, at the time this court decided Simpang Empat No 1 and also when Abdull Hamid Embong J decided the preliminary objection in Simpang Empat No 2, *Kimlin* had not been decided yet. Simpang Empat could not use it as a ground in their application as the law as laid down in *Kimlin* was not in existence yet. That is why the ground given in prayer 1 of the originating summons (Simpang Empat No 2) only resorted to the provisions of ss 340(2)(b) and/or s 340(4)(b) of the NLC besides the allegation that the transfer was undertaken in contravention of the express restriction that the land in question *tidak boleh ditukarkan nama, digadai atau dipajak ataupun dijualkan melainkan dengan kelulusan bertulis oleh Menteri Besar Perak.*

[30] Of course, s 340(2)(b) of the NLC relied on by Simpang Empat includes 'insufficient or void instrument'. And, if the receivers and managers have no power to sell without resorting to the provisions of the NLC, according to *Kimlin*, the transfer would be void.

[31] So, does *Kimlin* have an effect on the preliminary objection? First, in my view, *Kimlin* cannot retrospectively affect the decision of this court in Simpang Empat No 1. The reasons are, first, *Kimlin* is a later decision in a completely different case on a matter which was not an issue in the preliminary objection in Simpang Empat No 1. It was never an issue in Simpang Empat No 1 whether a chargee could sell the charged land without resorting to the NLC. Secondly, even if it was an issue and this court had decided differently in Simpang Empat No 1, a subsequent decision in *Kimlin*

by this court would not have the effect of reopening the judgment in Simpang Empat No 1. Simpang Empat No 1 had been decided. The decision is final. The matter is closed.

[32] But, as I have pointed out, if the effect of *Kimlin* is to render the sale void, then it may be argued that the registration was effected with an 'insufficient or void instrument'. (I say 'if' because the issue would be an issue to be decided by the High Court if Simpang Empat No 2 is allowed to proceed and I do not think that I should prejudge the issue and bind the High Court before it has even heard the case). If that is the effect of *Kimlin*, then it cannot be said that it would not be in the interest of the company for the directors to institute Simpang Empat No 2. Neither could it be said that it would 'impinge prejudicially upon the position of the debenture holders by threatening or imperilling the assets which are the subject of the charge'. The Court of Appeal is right on those findings.

[33] But does *Kimlin* have an effect on Simpang Empat No 2? The High Court judge could not be faulted for not considering *Kimlin* because *Kimlin* had not been decided when the learned judge decided on the preliminary objection. However, by the time the Court of Appeal heard the appeal, *Kimlin*'s decision was already there. It is therefore quite right for the Court of Appeal to take it into consideration. But it should be only for the purpose of deciding the preliminary objection. The final decision on the effect must be left open for the High Court hearing the originating summons (Simpang Empat No 2) to decide. The court then might also have to consider the effect of *Melatrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor* [2003] 2 MLJ 193.

[34] In my view, there is, at least, an arguable case now that the sale may be void (this is a matter that should be decided by the High Court at the hearing of the originating summons). So, it follows that for the purpose of deciding the preliminary objection, the requirement of the law has been satisfied for the directors to bring the action in Simpang Empat No 2.

[35] It is clear in my mind that I am not applying *Kimlin* retrospectively. It would be retrospective if it were applied to reopen Simpang Empat No 1. But Simpang Empat No 2 is a new action. Simpang Empat No 1 does not prevent Simpang Empat No 2 from being filed, because Simpang Empat No 1 was decided purely on the issue of locus standi of the directors, not on the merits, based on the circumstances then.

[36] Regarding the questions posed to this court, the first question arose from the fact that the Court of Appeal had relied on the doctrine of res judicata in a wider sense to arrive at its conclusion. However, as I am of the view that in Simpang Empat No 2 we are not reopening Simpang Empat

No 1 as it is a fresh action which is not prevented from being brought by Simpang Empat No 1 since Simpang Empat No 1 was decided only on the issue of locus standi, it was completely unnecessary for the Court of Appeal to rely on the doctrine of res judicata in the wider sense at all. In the circumstances, I would prefer not to answer Question No 1 at all.

[37] On question No 2, as that issue might be an issue in this case in the High Court, I do not think it should be answered yet.

[38] Question No 3 too need not be answered as it is quite irrelevant to this decision.

[39] In conclusion, I would dismiss the appeal. The order made by the Court of Appeal is hereby affirmed. As regards costs of this appeal, since the respondent's success is not due to their effort in bringing new evidence that there had been a change of circumstances in their favour (indeed they had failed in the High Court) but due to a subsequent intervening event, ie, the judgment of this court in *Kimlin*, I would order that only half costs be paid by the appellants to the respondent.

[40] My brothers Augustine Paul and Abdul Aziz Mohamad FCJJ have read this judgment and agree with it.

Appeal dismissed with costs.

Reported by K Nesan